

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 8, 2008 Session

**GRAY'S DISPOSAL CO., INC. ET AL. v. METROPOLITAN
GOVERNMENT OF NASHVILLE, DAVIDSON COUNTY, TN ET AL.**

**Appeal from the Chancery Court for Davidson County
Nos. 983317, 983400, 033890, 98-3317-III, 03-3890-I-(III), 98-3400-II(III)
Ellen Hobbs Lyle, Chancellor**

No. M2007-00528-COA-R3-CV - Filed February 23, 2009

This is the second appeal in consolidated cases concerning tipping fees charged for residential waste disposal. Privately-owned garbage haulers ("Appellants") originally sued metropolitan government ("Metro") challenging the constitutionality of the tipping fees; Metro filed a separate action against Appellants for past-due tipping fees. The trial court granted summary judgment in favor of Metro and Appellants appealed. On December 31, 2002, this Court ruled in Metro's favor and remanded the matter instructing the trial court to calculate the amount of tipping fees Appellants owed Metro for the period after November 5, 1997. Pending a hearing on remand, Appellants sought to recover the amount of tipping fees paid Metro before November 5, 1997, by filing a separate action in the same court. The trial court dismissed Appellants' action based on the doctrines of res judicata and collateral estoppel.

The final hearing on remand was held June 19, 2007, more than four years after this Court's decision in the first appeal. In April 2007, just prior to the hearing, the Supreme Court of the United States issued an opinion, *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007), which Metro alleged abrogated our earlier decision in 2002. Abiding by our limited instructions for remand, the trial court declined to consider *United Haulers* or Appellants' request for a set-off of fees paid prior to November 5, 1997 and determined the amounts owed Metro. Metro's motion to alter or amend the judgment was denied. Both parties appeal. We have determined that Appellants' second attempt to recover the tipping fees paid prior to November 5, 1997, was barred by the doctrines of res judicata and collateral estoppel and affirm the trial court's decision with respect to *United Haulers*.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Thurman T. McLean, Jr., Nashville, Tennessee, for the appellants, Gray's Disposal Co., Inc., Ray Webster d/b/a Hermitage Hills Sanitary Co., and Ray Webster.

J. Brooks Fox, Margaret Overton Darby, Lora Barkenbus Fox, and Elizabeth A. Sanders, Nashville, Tennessee, for the appellee, Metropolitan Government of Nashville, Davidson County, Tennessee.

OPINION

PROCEDURAL HISTORY

This is the second appeal in consolidated cases disputing the constitutionality and amount of tipping fees owed the Metropolitan Government of Nashville and Davidson County (“Metro”) by private garbage haulers for disposing of residential waste at a Metro-owned facility.¹ Gray’s Disposal Co., Inc. and Ray Webster d/b/a Hermitage Hills Sanitary Co. (collectively “Gray’s Disposal” or “Appellants”) challenged the legality of the tipping fees by filing a complaint against Metro on November 6, 1998. Appellants’ action was assigned case number 98-3317-III. Among its requests for relief in case number 98-3317-III, Gray’s Disposal sought a judgment declaring the tipping fees unconstitutional and asked that Metro “refund all past tipping fees paid by Plaintiffs to [Metro] and an accounting for the same.” Metro filed a complaint against Appellants to collect unpaid tipping fees on November 16, 1998,² which was assigned case number 98-3400-II(III), and the actions were later consolidated by agreed order.

On March 12, 2001, the trial court granted summary judgment on case number 98-3317-III in Metro’s favor finding the tipping fees did not amount to double taxation or an illegal flow control mechanism and did not violate equal protection or antitrust laws as a restraint of trade.³ Metro then moved for summary judgment on case number 98-3400-II(III) arguing that the amount of unpaid tipping fees was undisputed since Appellants’ only asserted defense, that the fees were illegal, was dismissed. Finding no genuine issue of fact existed as to the amount of fees owed Metro, the trial court granted summary judgment in case number 98-3400-II(III).⁴ Appellants’ appeal from the grant of summary judgment in both cases formed the basis of the first appeal before this Court.

¹ A detailed factual account and discussion of the Metro ordinance and collection of tipping fees appears in *Gray’s Disposal Co., Inc. v. Metro. Gov’t of Nashville & Davidson County*, 122 S.W.3d 148 (Tenn. Ct. App. 2002) (hereinafter referred to as “*Gray’s Disposal I*”).

² Gray’s Disposal Co., Inc. was in bankruptcy at the time Metro filed action number 98-3400-II(III) against Webster. Metro subsequently filed a verified amended complaint on October 24, 2001, adding Gray’s Disposal as a defendant once it was out of bankruptcy.

³ Gray’s Disposal abandoned claims asserted on behalf of individual taxpayers and in violation of the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-202 *et seq.*, and under Tenn. Code Ann. § 39-17-308.

⁴ It was undisputed that Gray’s Disposal Co., Inc. owed \$66,979.00 in unpaid tipping fees and that Ray Webster d/b/a Hermitage Hills Sanitary Co. owed \$55,275.00 in unpaid tipping fees. Appellants did not file an answer to Metro’s complaint before Metro moved for summary judgment.

On December 31, 2002, we affirmed summary judgment on case number 98-3317-III, Appellants' declaratory judgment action seeking a refund of all past tipping fees paid to Metro. *See Gray's Disposal I*, 122 S.W.3d at 169. We vacated the grant of summary judgment on case number 98-3400-II(III), Metro's action to collect unpaid tipping fees, and remanded with the following instruction: "We remand this cause to the trial court for determination of the respective totals owing by each respective appellant for unpaid tipping fees accumulated after November 5, 1997."⁵

After the mandate was entered following the first appeal but before a hearing was held to address the issues remanded to the trial court, Gray's Disposal filed a separate action in the chancery court seeking reimbursement of the tipping fees paid to Metro prior to November 5, 1997. The action was filed on December 31, 2003, and assigned case number 03-3890-I(III). Metro moved to dismiss the complaint arguing that the relief sought was the same relief requested in case number 98-3317-III and was therefore barred by the doctrines of res judicata and collateral estoppel. Metro also argued the action was barred by the statute of limitations. By order dated January 30, 2007, the trial court dismissed Appellants' action, number 03-3890-I(III), on res judicata and collateral estoppel grounds and reiterated that the only remaining issue for determination on remand was the amounts owed Metro in case number 98-3400-II(III).⁶ In a later order dated March 26, 2007, the chancellor set the remand hearing for June 19, 2007, to address "the only issue remaining in this case: the amounts owed to Metro in Cause No. 98-3400-II(III)."

Shortly thereafter, on April 30, 2007, the United States Supreme Court issued an opinion in which it held that certain flow control ordinances did not discriminate against interstate commerce in violation of the Commerce Clause. *See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 127 S. Ct. 1786, 1795 (2007) (holding flow control ordinances which benefit public facilities but treat private entities the same do not discriminate against interstate commerce for purposes of the dormant Commerce Clause).⁷ Believing the holding in *United Haulers* affected the pending remand, Metro filed with the chancery court and served on Gray's Disposal a "Notice of Filing Intervening Change in Controlling Authority" on June 1, 2007. Specifically, Metro asserted that *United Haulers* applied retroactively to supersede our previous ruling by abrogating the holding in *Waste Mgmt.*, thereby entitling Metro to recover the full amount

⁵ We found November 5, 1997 determinative because it was the date of the Sixth Circuit's decision in *Waste Mgmt., Inc. of Tenn. v. Metro. Gov't of Nashville & Davidson County*, 130 F.3d 731, 736 (6th Cir. 1997) in which the court found Metro's flow control ordinance facially discriminated against interstate commerce and enjoined its enforcement. *See Gray's Disposal I*, 122 S.W.3d at 167-68. We expressly rejected Appellants' argument that the tipping fees as a whole constituted an unlawful flow control mechanism. *Id.* at 165-66.

⁶ Because the court determined that case number 03-3890-I(III) was barred by the doctrines of res judicata and collateral estoppel, the trial court did not reach the statute of limitations issue. Gray's Disposal appealed the January 30th order before it was final. This Court held the notice of appeal in abeyance pending a final judgment and later reiterated that the chancery court retained jurisdiction over consolidated cases 98-3317, 98-3400, and 03-3890.

⁷ As of the writing of this opinion, the United States Reports volume containing *United Haulers* had not been published and, therefore, no pagination information was available to provide pinpoint citations. We will hereinafter cite to the Supreme Court Reporter.

of unpaid tipping fees on remand. Gray's Disposal did not file a response but filed a "Notice of Affirmative Defenses" on June 9, 2007, indicating that it planned to assert the defenses of laches, statute of limitations, and res judicata at the hearing.

The final hearing on remand was held June 19, 2007. The trial court disagreed with Metro's position regarding *United Haulers* and prevented it from recovering all unpaid fees stating, "I'm going to stick with what the Court of Appeals told me to do on the remand." In addition, the trial court dismissed the affirmative defenses as either not proven or untimely.⁸ The proof showed that Webster ceased operations as of November 5, 1997, and therefore did not owe Metro any tipping fees; the case was dismissed as to Webster. The court entered a judgment against Gray's Disposal for \$62,036.80 in unpaid tipping fees incurred after November 5, 1997. Metro moved to alter or amend the judgment based on its argument that *United Haulers* abrogated our earlier opinion and entitled Metro to recover the full amount of tipping fees awarded on summary judgment in case number 98-3400-II(III), not just those incurred after November 5, 1997. The trial court denied Metro's motion on September 7, 2007, on the grounds of the "untimeliness, stealth and informality with which Metro raised the issue resulting in unfair prejudice to the haulers." Both parties appeal.

As stated by Appellants, the issue for our review is whether our previous ruling in *Gray's Disposal I* bars them from seeking reimbursement of tipping fees paid to Metro before November 5, 1997, based on the doctrines of res judicata or collateral estoppel. Metro appeals the denial of its motion to alter or amend the judgment claiming the trial court erred when it failed to retroactively apply *United Haulers* and found Metro acted unfairly.

ANALYSIS

Application of *United Haulers*

We first address Metro's argument that *United Haulers*, 127 S. Ct. at 1795, abrogates our previous ruling and should have been applied on remand. Our review of a trial court's findings of fact "shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). Issues involving a trial courts' legal conclusions are reviewed de novo without any presumption of correctness. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008).

⁸It is important to note a fourth action independent of but relevant to this appeal. On May 3, 2006, Metro filed a complaint against Gray's Disposal Co., case number 06-1111, to collect unpaid tipping fees incurred between August 2001 and August 2002. The case was dismissed on Gray's Disposal's motion asserting that 06-1111 was barred by the 3-year statute of limitations in Tenn. Code Ann. § 28-3-105. Metro appealed arguing that the applicable statute of limitations was six years pursuant to Tenn. Code Ann. § 28-3-109. We affirmed, however, Metro's appeal was pending at the time the remand hearing was held in case number 98-3400-II(III) and, therefore, the statute of limitations issue was not yet resolved. See *Metro. Gov't of Nashville & Davidson County v. Gray's Disposal Co., Inc.*, No. M2007-00073-COA-R3-CV, 2008 WL 624851 (Tenn. Ct. App. Mar. 6, 2008) (perm. app. denied Oct. 27, 2008). The chancery court dismissed Appellants' statute of limitations defense as untimely with respect to cause 98-3400 since notice of that defense was given "on the eve of trial."

In the instant action, the trial court refused to consider the impact of the Supreme Court's decision in *United Haulers* because it was bound by our instructions on remand and because it had previously specified the sole remaining issue for trial in its March 26, 2007 pretrial order. The Supreme Court's opinion was issued about a month later on April 30, 2007. Because we find that our ruling in *Gray's Disposal I* established the law of the case and for equitable reasons discussed below, we need not address what, if any, effect the *United Haulers* decision has with respect to Metro's ordinance.

When an appellate court issues an opinion deciding matters raised in an action, that ruling becomes the law of the case and binds the trial court and parties on remand and throughout the same case. *Harrison v. Laursen*, 128 S.W.3d 204, 208 (Tenn. Ct. App. 2003). The law of the case doctrine "promotes finality and efficiency of litigation, ensures consistent results in the same litigation, and assures that lower courts follow appellate decisions." *Id.* The rule generally prohibits reconsideration of issues actually raised and decided on appeal and issues necessarily decided by implication on appeal. *Memphis Publ'g Co. v. Tenn. Petroleum Underground Storage Tank Bd.*, 975 S.W.2d 303, 306 (Tenn. 1998). As explained by our Supreme Court, "when an initial appeal results in a remand to the trial court, the decision of the appellate court establishes the law of the case which generally must be followed upon remand by the trial court, and by an appellate court if a second appeal is taken from the judgment of the trial court entered after remand." *Id.* (citing 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *FEDERAL PRACTICE AND PROCEDURE* § 4478, 790 (1981)). The rule is discretionary, and there are limited circumstances that may justify reconsideration of an issue decided in a prior appeal, such as a change in controlling authority. *Id.*

"[U]nder the law of the case doctrine, an appellate court's decision on an issue of law is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal." *Memphis Pub'g Co.*, 975 S.W.2d at 306. As this Court's decision resulted in a remand of cause 98-3400 and the facts in that case remained unchanged, we find the law of the case doctrine allowed the trial court to refuse to retroactively consider *United Haulers*. It is well-established that a trial court may not disregard or modify the opinion of an appellate court. *See Weston v. State*, 60 S.W.3d 57, 59 (Tenn. 2001); *Freemon Indus. LLC v. Eastmon Chem. Co.*, 227 S.W.3d 561, 567 (Tenn. Ct. App. 2006). Metro concedes that application of *United Haulers* would go to the substance of this Court's ruling in *Gray's Disposal I*. Its request to apply *United Haulers* on remand was therefore a request to modify this Court's opinion. We have previously reviewed the authority of a trial court on remand:

Once the mandate [from an appellate court] reinvests the trial court's jurisdiction over a case, the case stands in the same posture it did before the appeal except insofar as the trial court's judgment has been changed or modified by the appellate court....[T]he trial court does not have the authority to modify or revise the appellate court's opinion, or to expand the proceedings beyond the remand order. The trial court's sole responsibility is to carefully comply with directions in the appellate court's opinion.

Freemon, 277 S.W.3d at 567 (quoting *Earls v. Earls*, No. M1999-00035-COA-R3-CV, 2001 WL 504905, at *3 (Tenn. Ct. App. May 14, 2001)). It is clear from the record in this case that the chancellor carefully followed our instructions for remand, repeatedly telling the parties she intended to strictly abide by the remand.

While a change in controlling law may justify setting aside the law of the case doctrine, we agree with the trial court's conclusion that this was one of those "unique cases where on grounds of fairness, procedure trumps substance."⁹ We cannot ignore the fact that more than four years passed before a hearing was held to address the issue remanded by this Court. A final judgment will not be altered or amended unless the complaining party presents "clear, convincing, cogent evidence" that it has suffered an injustice and that it is in no way responsible for causing the alleged injustice. *Myers v. Myers*, 891 S.W.2d 216, 220 (Tenn. Ct. App. 1994). Had Metro pursued the relief afforded it by this Court in a timely fashion, the action would have been closed long before *United Haulers* was decided.¹⁰ We find unpersuasive Metro's argument that the lengthy delay was caused by Appellants' filing of case number 03-3890-I(III). Metro offers no other explanation for its delay in effectuating a hearing on remand. Accordingly, we find that the trial court did not err when it declined to modify our instructions on remand in *Gray's Disposal I*.

Metro also contends the trial court erred in "finding Metro guilty" of untimeliness, stealth, and informality in the manner in which it raised *United Haulers*. While we do not agree with Metro's position on the application of *United Haulers* to this case, based on the evidence in the record, we do not believe Metro acted in bad faith or underhandedly when it filed the notice of what it believed was a change in controlling authority. Metro notified the court and the parties of the case within a reasonable time, approximately one month after the Supreme Court issued its opinion. Nevertheless, notice was not given until 18 days before trial and resulted in some prejudice to Gray's Disposal. If there is any error in the trial court's findings, it is harmless.

Appellants' Action for a Refund of Tipping Fees

We now consider whether the trial court erred in dismissing Appellants' second action, case number 03-3890-I(III), to recover tipping fees on res judicata and collateral estoppel grounds. A trial court's decision of whether a subsequent lawsuit is barred by the principles of res judicata or collateral estoppel presents a question of law that this Court reviews de novo with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993); *In re Estate of Boote*, 198 S.W.3d 699, 719 (Tenn. Ct. App. 2005).

⁹ In denying Metro's Rule 59 motion, the trial court also concluded that it was required to give retroactive effect to *United Haulers* "under circumstances where Metro has formally and properly proceeded such as by filing a motion to alter or amend the Court's March 26, 2007 order to fairly expand the issues for trial. Metro failed to do so."

¹⁰ Although there is no required time frame by which a remand hearing must be conducted pursuant to Tenn. R. App. P. 43(c), a trial court should generally "interpret an order remanding a case as implicitly requiring a prompt hearing in accordance with the remand." *State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1997).

Res judicata, or claim preclusion, “bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or could have been raised in the former suit.” *State ex rel. Cihlar v. Crawford*, 39 S.W.3d 172, 178 (Tenn. Ct. App. 2000). Collateral estoppel, or issue preclusion, bars the same parties or their privies from relitigating in a second suit issues that were actually raised and determined in the former suit. *Massengill v. Scott*, 738 S.W.2d 629, 631 (Tenn. 1987); *Cihlar*, 39 S.W.3d at 178-79. A party defending on the basis of res judicata or collateral estoppel has the burden of proving the following: “(1) that the underlying judgment was rendered by a court of competent jurisdiction; (2) that the same parties were involved in both suits; (3) that the same cause of action was involved in both suits; and (4) that the underlying judgment was on the merits.” *Lee v. Hall*, 790 S.W.2d 293, 294 (Tenn. Ct. App. 1990); *see also Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 459 (Tenn. 1995).

Gray’s Disposal admits on appeal that the action in case number 03-3890-I(III) is between the same parties as in case 98-3317. In the initial action, case number 98-3317, Appellants explicitly sought a “refund [of] all past tipping fees paid by Plaintiffs to [Metro] and an accounting for the same.” In the second action case number 03-3890-I(III), Appellants explicitly sought “reimbursement of tipping fees paid prior to November 5, 1997[.]” The causes of action assert the same claim for refund and seek the same relief.

Nonetheless, Appellants based the second complaint, and their argument in this appeal, on the following verbiage taken from this Court’s opinion:

Appellants can not be held liable for the payment of fees, where such fees were imposed involuntarily upon appellants as a mandatory requirement of an illegal municipal regulation. Our finding that the tipping fees, when imposed as a mandatory element of an illegal flow control regulation, violate appellants’ commerce clause rights, is not inapposite of our holding that the tipping fees currently imposed by Metro do not infringe upon appellants’ constitutional rights. . . . On this basis, we hold that appellants remain liable for the payment of any unpaid tipping fees accumulated by the respective appellants after November 5, 1997.

Gray’s Disposal I, 122 S.W.3d at 169. Appellants interpret this language to support their conclusion that if tipping fees imposed prior to November 5, 1997, cannot be collected, then we intended fees actually collected before that date to be reimbursed. They contend that our instruction limiting the issue on remand to a determination of the amount of tipping fees incurred after November 5, 1997, does not bar Appellants from seeking reimbursement of any fees actually paid. We disagree.

As discussed above, trial courts are bound to abide by the orders and precedents set by appellate courts. *See Weston*, 60 S.W.3d at 59. According to our Supreme Court, “‘The slightest deviation from this rigid rule would disrupt and destroy the sanctity of the judicial process. There would be no finality or stability in the law and the court system would be chaotic in its operation and unstable and inconsistent in its decisions.’” *Irick*, 906 S.W.2d at 443 (quoting *Barger v. Brock*, 535 S.W.2d 337, 341 (Tenn. 1976)).

In dismissing Appellants' second action, the trial court reiterated that it was bound by our instructions for remand and relied on footnote 5 of *Gray's Disposal I* to conclude that our "affirmation of summary judgment in case no. 98-3317-III . . . was done with the knowledge and in contemplation of a refund claim having been pled by [Gray's Disposal] in that case." The chancellor further noted that our instructions for remand did not include "an across the board accounting for claims of all the parties such as the plaintiffs' refund claim." Language taken directly from *Gray's Disposal I* evinces this Court's awareness of the relief Appellants were seeking when reviewing case 98-3317: "Appellants also sought judgments from the court declaring the tipping fees illegal, and affirming that the appellants were entitled to a refund of 'all past tipping fees paid by Plaintiffs to the Defendants and an accounting for the same.'" *Gray's Disposal I*, 122 S.W.3d at 153 n.5. Moreover, this Court stated: "We further interpret appellants' response as a statement inherently opposing the collection of tipping fees imposed by Metro upon appellants *prior to* the Sixth Circuit's decision in *Waste Mgmt.*" *Gray's Disposal I*, 122 S.W.3d at 156 (emphasis added).

When we affirmed summary judgment and the dismissal of 98-3317, Appellants' claim for a refund of any tipping fees previously paid to Metro was extinguished. Gray's Disposal was therefore barred from asserting a second claim for a refund due to the doctrines of res judicata and collateral estoppel. If Appellants believed the opinion in the first appeal was in error or overlooked an issue,¹¹ then the appropriate remedy was to file a petition for rehearing pursuant to Tenn. R. Civ. P. 39(a), or file an application with the Supreme Court of Tennessee for permission to appeal.¹² Additionally, Gray's Disposal agreed with the trial court's decision not to apply *United Haulers* on remand relying on this Court's limited instructions for remand. In turn, Gray's Disposal must abide by the same limitations imposed by our instructions for remand with respect to the calculation of tipping fees. The judgment dismissing cause number 03-3890-I(III) is affirmed.¹³

CONCLUSION

Having determined that *Gray's Disposal I* established the law of the case, we conclude that the chancery court did not err in denying Metro's request to retroactively apply *United Haulers* or

¹¹We do not suggest that this Court's opinion was in any way wrongly decided or in error.

¹²Metro sought to appeal our decision in *Gray's Disposal I* to the Supreme Court but Gray's Disposal did not. The Tennessee Supreme Court denied permission to appeal on July 7, 2003.

¹³Appellants also cite as error the trial court's ruling to disallow the statute of limitations defense at the remand hearing. However, Appellants raise this issue for the first time in their reply brief. Tennessee Rules of Appellate Procedure provide that the brief of the appellant shall include "[a] statement of the issues presented for review[.]" Tenn. R. App. P. 27(a)(4), and that "[t]he appellant may file a brief in reply to the brief of the appellee[.]" Tenn. R. App. P. 27(c). Appellants are not permitted to raise new or different issues for review in their reply brief and, therefore, we do not consider the statute of limitations issue. See *Guth v. Suntrust Bank, Inc.*, No. E2006-00212-COA-R3-CV, 2007 WL 1135488, *2 (Tenn. Ct. App. Apr. 17, 2007). Appellants' request for prejudgment interest is likewise not considered since we did not find in their favor.

in dismissing Appellants' second attempt to recover tipping fees. Judgment of the trial court is affirmed in all respects. Costs of appeal are assessed one half to the appellants and one half to the appellee, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE